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THE MORAL VALUE OF LAW†

*Philip Soper**

In his book A Theory of Law, Professor Soper argues that there is always a moral reason to obey the law, assuming that the responsible officials have acted in good faith. Even when this moral reason is overridden by competing moral considerations, it is not extinguished, and the law thus retains its moral value. In the following Article, Professor Soper takes the opportunity to clarify the implications of his theory, and to meet some of the objections raised by Professor Greenawalt in The Natural Duty to Obey the Law, in this issue. Professor Soper concludes with some thoughts on why contemporary views tend to be skeptical about the moral value of law.

Suppose you have correctly concluded that it is your legal obligation to act or refrain from acting in a certain way. Can you, from that conclusion alone, say anything at all about what you ought to do morally?

An affirmative answer to this question implies that law has moral value regardless of content or circumstance: without knowing what the act is that the law commands or even what legal system has enacted the law, one would, on this view, be able to link the conclusion about legal obligation with *some* conclusion about moral responsibility. Such a view seems quite far-reaching precisely because it asserts a connection between law and morality that is universal in scope. In another respect, however, the claim could be quite weak: the alleged link between law and morality, though universal *in scope*, might be weak *in effect*, in the sense of being easily broken or overcome by countervailing considerations based on the content of particular laws or the nature of a particular legal system. Whether one thinks an affirmative answer to the question is plausible may well depend on whether the breadth of the claim in terms of scope is offset by modesty in terms of claimed effect.

It should also be clear that one cannot answer this question unless one already knows something about both law and morality. One must know, for example, that, although most laws are coercive constraints of a certain sort, not every coercive restraint is a "law." Thus the

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orders of highwaymen and terrorists, however effective, are not going to be among the candidates one has to consider in deciding whether all laws have some moral value. Similarly, one must know something about morality. One must have a theory about the circumstances in which coercive directives or requests for action place moral constraints on what one may otherwise do. Finally, one must compare the moral and legal theories. Is it possible that those directives that everybody agrees are "legal" turn out to be characterized by¹ facts that are always relevant to the moral evaluation of proposed action?

I have argued elsewhere for an affirmative answer to this question.² Legal systems, I suggested, are characterized by (1) a relative monopoly on force, and (2) a good faith attempt by those who control that force to issue laws they believe to be just or in the common good.³ I also said that an adequate moral theory will show that there is always some moral reason to go along with such directives in acknowledgment of the good faith effort of those who perform this necessary task.

Professor Greenawalt, in the course of his stimulating and careful review of theories about the obligation to obey the law, raises several challenges to the moral theory part of this argument.⁴ I shall take advantage of the opportunity presented by his challenge to clarify those aspects of the theory that seem to me most likely to mislead and to respond to what seem to me the most plausible points of disagreement about this issue. In doing so, I also hope to show that there is an intuitive base for the moral theory described here in the judgments we make in a variety of other, nonlegal contexts.

I. "OBLIGATION TO OBEY" VS. "MORAL REASON TO COMPLY"

That philosophy has fashions can be disconcerting to those who believe the enterprise should be converging on an unchanging reality. True, philosophical opinions do not change quite as rapidly as fashions

1. Note that I do not say "entail." For an explanation of how a factual phenomenon can become universally associated with a moral conclusion without making the connection an analytic one, see my discussion in Soper, *Legal Theory and the Obligation to Obey*, 18 Ga. L. Rev. 891, 905-09 (1984). See also text at note 37 *infra*.

2. P. SOPER, A THEORY OF LAW (1984).

3. The claim that the law is just (or more typically, that the fundamental rules of the system are just) entails in my view the claim that the system serves the interests of all. What is critical is that the imposition of sanctions and the disparate treatment of various groups and individuals within a coercive order be sincerely thought to be defensible according to some underlying political or moral theory. See P. SOPER, *supra* note 2, at 118-19.

4. See Greenawalt, *The Natural Duty to Obey the Law*, in this issue. I do not understand Professor Greenawalt to challenge the claim about what characterizes a "legal" system. In that respect, Greenawalt's approach shares with many others the assumption that these questions can be answered independently of each other. For doubts as to the validity of this assumption, see Soper, *supra* note 1.

in clothes. But they do exhibit, particularly in the area of moral or political theory, a similar tendency to circle back and revitalize previously discarded modes of dress or thought.⁵

Contemporary political theory seems to be in the process of discarding an outdated mode of thought. The outmoded view is that citizens have an absolute obligation to obey the law, however unjust. Some people think Socrates argued for such a view in the *Crito*,⁶ but one can find political theorists closer to us in time and more influential in shaping the theory of the modern, liberal state who held similar views. Hobbes is the clearest example; but even a thinker like Kant, whose moral theory is usually thought to be the polar opposite of the egoistic approach of Hobbes,⁷ claimed that the citizen's duty to submit to the State was very strong, perhaps absolute.⁸ Other thinkers during this period, notably Locke,⁹ held different views. The interesting contrast with contemporary views is presented by two features: (1) the total lack of disagreement today on the question of whether the duty to the State is absolute (no one, as far as I know, seriously argues that the obligation to obey can never be overcome by countervailing considerations based, for example, on the injustice of the law in question), and (2) the emergence of a view that is the direct opposite of the one ascribed above to Socrates and Hobbes: far from there being an absolute obligation to submit, there is no moral obligation to obey law *qua* law at all.

This second view is usually expressed by denying that there is even

5. Of course, this constant shifting of philosophical opinion can itself be viewed as part of the unchanging reality that needs to be explained, leading, if one has a sense of humor, to a "Philosophy of Clothes," see T. CARLYLE, SARTOR RESARTUS 267 (C. Harrold ed. 1937) ("[A]ll Symbols are properly Clothes; . . . all Forms whereby Spirit manifests itself to sense, whether outwardly or in the imagination, are Clothes . . . [including] the Pomp and Authority of Law . . ." *Id.* at 270); if one does not, to a *Phänomenologie des Geistes*, see Hegel's PHENOMENOLOGY OF SPIRIT (A. Miller trans. 1977).

6. See P. SOPER, *supra* note 2, at 177 n.1.

7. This view about the difference between the basic moral theories of Hobbes and Kant is the popular one. But there is strong evidence for the view that Hobbes's basic moral theory resembles Kant's more than it does the egoistic, teleological view usually ascribed to him. This is the so-called "Taylor-Warrender thesis." Baumrin, *Introduction to HOBBS'S LEVIATHAN* at 6 (B. Baumrin ed. 1969). See Taylor, *The Ethical Doctrine of Hobbes*, in 13 *PHILOSOPHY* 406 (1938), reprinted in HOBBS'S *LEVIATHAN*, *supra*, at 35; Warrender, *Hobbes's Conception of Morality*, reprinted in HOBBS'S *LEVIATHAN*, *supra*, at 67.

8. See KANT'S POLITICAL WRITINGS 143-47 (H. Reiss ed. 1970):

The reason why it is the duty of the people to tolerate even what is apparently the most intolerable misuse of supreme power is that it is impossible ever to conceive of their resistance to the supreme legislation as being anything other than unlawful and liable to nullify the entire legal constitution.

Id. at 145 (quoting *The Metaphysics of Morals*). Elsewhere, Kant seems to suggest that "passive resistance" to unjust laws is permissible, though active rebellion is not. See *id.* at 31 & n.1.

9. Locke's views are complex and interesting; see note 28 *infra*.

a *prima facie* obligation to obey the law. It is a view that has been described as "becoming more popular,"¹⁰ and it is a view that I gather Professor Greenawalt also means to endorse. In deciding whether it is a correct view, one confronts a difficult initial question in explaining just what is meant by a "*prima facie*" obligation. Many who use that term mean something quite strong: a *prima facie* obligation is almost like an ultimate obligation except that it allows for an excuse in exceptional cases where an unforeseen disaster can be averted only by disregarding what would otherwise be one's duty.¹¹ I do not use the term in this strong sense and have no quarrel with those who insist that laws do not always create such strong moral obligations. My quarrel is with the increasingly popular conclusion that many seem to reach once this strong notion of obligation to obey is rejected. That conclusion seems to be that there is no necessary moral value to law at all. This conclusion would require a negative answer to the question with which we began: the mere fact that something is your legal obligation does not by itself tell you anything about what, morally speaking, you should do.

Because the idea of obligation is itself such a difficult one, I prefer to avoid that language altogether and to talk instead of moral reasons to obey the law. This language helps convey two important ideas. First, we want to see whether there is always some reason to obey the law, however weak the reason is and however subject to being overridden by other, stronger reasons. Second, the reason must be a "moral" one. By a "moral" reason I mean roughly a reason that is concerned with the interests or well-being or rights of others, as opposed to prudential reasons that affect only one's own interests.¹² John Austin thought that the threatened sanction was the only kind of reason for compliance that could be universally associated with the idea of law. My question is whether there is always some other reason for compliance as well, one we would call a moral reason because of its focus on the interests of others rather than on simply one's own interest in avoiding a sanction.

This reference to Austin as a model also furnishes a guide for the question of how strong the link between law and morality must be in order to represent a challenge to the traditional positivist view. Austin didn't claim that the law always presented one with an overwhelming prudential reason to comply. Thus someone contemplating whether to obey a draft law might well conclude that prudence counseled risking

10. See Raz, *Authority and Consent*, 67 VA. L. REV. 103, 103 (1981).

11. See J. RAZ, PRACTICAL REASON AND NORMS 167-68 (1975).

12. See generally K. BAIER, THE MORAL POINT OF VIEW (1958).

prosecution and conviction rather than risking one's life in a war. Austin's only claim was that it is characteristic of law to present one with a certain kind of prudential reason to comply — viz., the risk, however slight, of incurring specially created, organized sanctions. This prudential reason must presumably be weighed against other reasons — including other prudential reasons — before deciding what to do. If Austin is right, then again the only answer to our initial question is a negative one: having determined your legal obligations, you know something about what prudence counsels, but nothing about what morality counsels. Similarly, to show that Austin was wrong, or at least to present a different view of law, one need only show that there is always some moral reason to comply with law: it need not be an overriding or nearly always overriding moral reason.

It may seem that this is a simple enough distinction to keep in mind. In practice, though, it is understandable that the idea of a reason that is to be taken into account, but that does not determine what one should do, often slips away. After all, if the conclusion, all things considered, is that one should not obey a particular law, what has one gained by suggesting that the law has some moral merit, which, however, is overwhelmed in this case by the substantive evil of its content? Doesn't the "putative" moral merit disappear in the final decision to disobey a really evil law?

This is not the place to do full justice to this thorny issue. I shall content myself by recounting, without defending, some common ways in which the role played by a moral reason to comply, even if it is not a conclusive reason, makes itself felt. First, all other things being equal, moral reasons are usually thought to override conflicting reasons of self-interest.¹³ Thus, if one has reasons of self-interest for disobeying, say, a draft law, and one can identify an equally strong moral reason for complying, the latter should control. Second, where moral reasons conflict, the weightier, though it prevails, does not erase the familiar sense of conflict — of having made a choice, more or less "tragic" depending on the consequences and how close the case — between the competing moral claims.¹⁴ Finally, as in the case of conflicting prudential reasons for obeying a law, the presence of a moral reason to comply can be detected by the process of decision one undergoes in deciding whether to obey. If there is always some moral reason to comply with the law, then disobedience will always require justifica-

13. See *id.* at 308.

14. See Smith, *Is There a Prima Facie Obligation to Obey the Law?*, 82 YALE L.J. 950, 952 n.5 (1973).

tion: one must explain what other reasons, presumably also moral, justify ignoring the law's moral claim.

I propose that we use this last feature as a test for what we mean by a *prima facie* obligation or moral reason to obey: such a reason exists if one is under a moral constraint to justify the act in question — in this case the act of disobedience. This requirement to justify disobedience would not exist, for example, if Austin's view of law were correct. Like the person who failed to put antifreeze in his car, a lawbreaker might be accused of foolishness, but not of action requiring justification.¹⁵

II. TESTING ONE'S INTUITIONS

Generalized discussions about moral obligation are less likely to lead to false conclusions if one keeps a close check on ordinary understandings and intuitions — not because the latter should control the former, but because intuitions provide a needed starting point as well as a commonsense check on abstract reasoning.¹⁶ Here, then, is a variation on the question with which this essay begins, taken from a recent and influential article by M.B.E. Smith on the obligation to obey. I offer it in order to let the reader test his or her own intuitions at the outset while at the same time allowing me to reemphasize the distinction made in the preceding section:

Suppose we were to ask a large number of people: "Jones has broken a law; but I won't tell you whether what he did is a serious crime or merely violation of a parking regulation, nor whether he had good reason for his actions. Would you, merely on the strength of what I have just told you, be willing to say that what he did was morally wrong?" I have conducted only an informal poll; but, on its basis, I would wager that the great majority would answer "I can't yet say — you must tell me more about what Jones did."¹⁷

If Professor Smith's wager seems a safe one, it is probably because one is interpreting the question asked in one of two rather special ways. In the context from which the quotation is taken, Smith is using the question, not to test one's intuitions about the obligation to obey, but to test one's intuitions about whether, in general, the acts proscribed by law are likely to be the same acts that morality would also proscribe. Smith is interested at this point in the content of the law, not in whether there is an obligation to obey regardless of content. On that interpretation of the question, one would probably take Smith's

15. I am ignoring for the moment both the fact that morality sometimes counsels prudence, and the fact that some theorists see no distinction between morality and prudence.

16. See J. RAWLS, *A THEORY OF JUSTICE* 48-53 (1971) (on "reflective equilibrium").

17. Smith, *supra* note 14, at 974.

side of the wager. For whether the law by and large gets things right, proscribing only acts that morality would also proscribe, depends a great deal on the particular society one is in and how quickly and accurately legislators respond to evolving moral judgments.

One might also agree with Professor Smith by adopting a second interpretation of his question — one that focuses on the obligation to obey, rather than on the content of the law. Even though we know the law sometimes requires morally improper acts, the question would now be whether the act of disobeying the law is itself morally wrong regardless of the act proscribed. Under this interpretation, one is still likely to find that most people cannot say whether disobedience in such cases is morally wrong without more information so long as the question is about ultimate, or a very strong sense of, obligation. No one can tell whether failure to obey the law, or for that matter failure to keep a promise, is morally wrong in this strong sense without knowing more of the circumstances.

To test intuitions about whether law has some universal moral value in the sense developed in the preceding section one must ask a slightly different question from the one Smith posed. One must ask: "Would you, merely on the strength of what I have just told you, be willing to say that Jones ought to come forth with some explanation or justification for what he did?" I have not conducted even an informal poll, and will leave to the reader the question whether the wager now still seems a safe one. I, for one, would want considerable odds.

III. OBJECTIONS

In what, then, does the moral value of the law consist? I suggested above that there is a moral reason to comply because those who enact the laws and those citizens who support them are doing a necessary job — viz., administering the relative monopoly on force that characterizes the State. I shall consider here three objections to this attempt to account for the moral value of law. The first objection is that even if those who back the law are in good faith trying to do a necessary job, I have no more reason to do what they want than I would to do what anyone else wants who makes requests of me. This objection aims at showing that the theory is too strong. The theory relies on ideas that are not essentially connected to the fact that law is necessary and thus would require extending the same obligation to comply with the requests of perfect strangers or others. Since the latter conclusion is counterintuitive, the theory fails as an account of moral obligation.

The second objection focuses on what might be called the "job description." Even if moral respect is due to those doing necessary jobs,

maybe some kinds of laws or States are in a sense *ultra vires*, and thus, not being necessary, do not deserve respect. A third objection is that, even if all attempts to direct the State's coercive power are part of the job and deserve my respect, that does not entail that I have a reason *to comply* with the law: respect can be shown in other ways. A variation of this objection asserts that there is no disrespect shown by breaking the law in certain cases — e.g., where disobedience is kept secret. These last two objections, including this last variation, aim at showing that the theory is too weak: it does not accomplish what it sets out to do because some laws will still remain that I have no moral reason to obey.

A. *The Theory Is Too Strong*

Standard utilitarian theories about the obligation to obey focus on the impact of disobedience on the legal system itself. If disobedience threatens, through example or otherwise, to destroy the system and to substitute anarchy in its place, then one has an obligation to obey the law and prevent such unhappy consequences. But many acts of disobedience do not have such disastrous effects. Thus this kind of utilitarian theory will not establish a very broad obligation to obey. Indeed, this kind of theory is exactly the opposite of the one I sketched at the outset: it is restricted in scope (not many laws will have the necessary moral value) and very strong in effect (where disobedience does have the posited effects, the duty to obey is very strong). In contrast to this concern with the objective effects of disobedience, the alternative moral theory sketched above focuses on the subjective interests of those who enact and support the law. Does that mean then that one has a moral reason to comply with the wishes of anyone in any context? Must I justify every refusal to contribute to each charity or cause that comes my way?

These questions seem easy to answer in the negative and that is why a theory about the value of law, if it is based on nothing more than the fact that other people want me to act in a certain way, may seem an inadequate moral theory. Of course, there are significant differences between the demand of the law and the request of a stranger, but before exploring those differences and their moral relevance, it is worth pausing to ask why it is so obvious that the mere fact that acting a certain way will make another person better off (by that person's lights) cannot count as a moral reason in favor of so acting.

Some philosophers do think we have moral reasons to attend to the interests of others — even without a request — at least where it is clear that those aided will gain more from such action than the bene-

factors stand to lose.¹⁸ Others think that such a conclusion is so counterintuitive and reflects so little our actual behavior that it proves that such a simple utilitarian account of moral duty cannot be a correct one. At least one needs to realize that this issue is not wholly free from doubt in moral philosophy and that there is a major tradition that counts the mere fact that someone else will benefit from my action as a reason for acting — assuming all other things are equal.

Unfortunately, one could accept the above-described tradition about what counts as a “reason” for acting, without accepting that these reasons are moral ones requiring me to justify my failure to act. The problem lies in the *ceteris paribus* clause. If there really is no other reason bearing on the question of how to act, one might think some explanation is called for when one ignores the request of another. But that conclusion seems less a result of moral theory than of a theory of rational action: we have hypothesized that one has ignored the only reason available that bears on what to do — surely an extreme case. It will probably always be possible to find some other reason for not heeding the request. It may be inconvenient, or I may prefer to use my time and resources in some other way, or it may be that what you want is not in fact what is good for you. If any of these reasons can be sufficient to justify failure to heed the request, the alleged moral reason to act seems to have no weight at all or so little that it can be outweighed by any reason, even those of self-interest. If so, it doesn’t seem to be a moral reason. If I can justify by simply saying “I didn’t want to,” that seems little different from saying one doesn’t need to justify at all, which corresponds to our initial intuition about not having a moral reason to respond to the requests of each and every stranger.

This account also helps explain what must be added to the simple request of another in order to present one with a plausible moral reason to comply. Those philosophers who reject what I called above the “simple” utilitarian account of moral duty often defend an alternative theory which entitles one to give special weight to certain people — friends, relatives, loved ones. Under this theory, one has moral reasons to attend to the interests of these people, but no moral reason to care for strangers in general.¹⁹ Of course a utilitarian can accept a similar conclusion, plausibly claiming that everybody will be better off in the long run if we all pay attention to those closest to us, whose

18. See Singer, *Famine, Affluence, and Morality*, 1 PHIL. & PUB. AFF. 229 (1972).

19. See Barry, *And Who Is My Neighbor?* (Book Review), 88 YALE L.J. 629, 635 (1979) (reviewing C. FRIED, *RIGHT AND WRONG* (1977)).

interests we know better, than if we dispersed our energy among all potential claimants.

What is common to both of these explanations is the perception that an additional step is required in order to elevate the interests of others to a level requiring moral response. I shall call this additional step a "focusing" requirement. There must be something in the situation that makes this individual stand out from all other potential claimants who could otherwise make the identical request. The reason for requiring some such focus is partly a recognition that otherwise there is no end to the moral demands we face and little space left for the individual to lead a life of his own. Put that way, the focusing idea seems most consistent with the moral view of the deontologist described above. But the idea can also explain the common utilitarian view about the need to relieve the severe distress of others.²⁰ It is the severity of the need, and the extent of the disproportion between wealthy countries and the famine-stricken, that makes many feel that requests for aid in these cases require a moral response. These people stand out from those generally less well-off in ways consistent with a focusing requirement.

There are many questions one would need to pursue in order to develop this focusing requirement into a fully adequate moral theory. In particular one would want to know what it is that brings people or events into moral focus. After all, the charity that sends me the letter each year has forced itself on my attention in a way that others have not, so that if being forced on my attention *de facto* were sufficient, we might be back at the proposition we rejected. Some moral, *de jure* notion of focus is often what we have in mind in asking what makes another stand out. The deontologist will answer by talking about choices I have made in connection with loved ones and others and the requirements of consistency and rationality in honoring those choices. The utilitarian will talk about the special harm that can be avoided or good that can be obtained in ways that distinguish one request for help from another. And both theories may have room for some examples that seem essentially *de facto*, as in the case of the drowning baby and the good samaritan.²¹

20. I have expressed elsewhere the view that there is little to choose between deontological and utilitarian theories at the level of basic moral intuitions. See Soper, *On the Relevance of Philosophy to Law* (Book Review), 79 COLUM. L. REV. 44 (1979) (reviewing B. ACKERMAN, *PRIVATE PROPERTY AND THE CONSTITUTION* (1977)). In general, I believe the moral theory articulated here can be accommodated to either of these traditional theories, with one possible exception, discussed below. See text at note 29 *infra*.

21. Indeed, the potential moral puzzles that might be used to shed light on the nature of this focusing requirement are many. Why do we have such trouble distinguishing omissions from action in some contexts? If we think that "letting die" is no different in some contexts from

I shall not pursue these questions here, however, because I believe enough has been said to see what must lie behind the claim that the demand of law is different from the request of any stranger. The interests of those who back and desire the actions required by law stand out because the job they are doing is a necessary one. My claim is that anybody who gives thought to the reasons for the State will in the end concede its necessity for reasons similar to those advanced by almost all political theorists from Hobbes to Locke. The State then occupies a special place in terms of one's own concession about what is valuable and good. The same is not true for charities and beggars. Their requests are not immoral or improper, but neither do they represent institutions or behavior that are rationally necessary.²² This "objective" claim about the value of law is what makes the subjective interests of those in charge worth moral consideration.²³

I do not want to repeat here what I have said elsewhere to explain why the State thus stands out in a way that others do not. Instead, I shall just note that the explanation given might apply to a variety of other situations that fall short of legal demands for compliance. We have already seen that some appeals for help will stand out and that a variety of moral intuitions about the duty to aid others will be explainable because of a rational calculation that this case is different from the numerous ways in which I might be asked for aid. Similarly, there may be requests of officials, short of what is expressed in law, that give

killing, it will be because something in the circumstances has brought into focus our ability to prevent a death by some easy step in a way that makes the causal connection between what we do and the death seem independent of the normal distinction between acts and omissions. Conversely, even though we might save many "statistical" lives by action we fail to take, we do not have the same sense of causal responsibility for those lives because they are not in our focus and hence not attributable to any "act" of ours. Omissions become actions when their consequences are equally forced on our attention as connected to a single decision.

22. Given that the poor are always with us, one might think that charities are rationally necessary and desirable in the same sense as law and so one should have the same moral reason to contribute to them. But, of course, there are still so many charities, no one of which comes into focus as does the State that I happen to be living in. If there were only one charity through which all aid could be given (a kind of super United Fund), I do not find it implausible to think that now one would have moral reasons to contribute: i.e., depending on one's own income, failure to do so would require justification. It is a curious feature of the focusing requirement that we sometimes escape all moral responsibility (e.g., to aid others) by the fact that no single claimant stands out. Explanations of this phenomenon will probably resemble explanations of the problem of public goods and free riders. See Barry, *supra* note 19, at 651-58, 658 n.98.

23. Greenawalt seems to think that my defense of the value of the State is only meant to prove that the law does no wrong when it backs its requests with force, thus restoring the State to the same level as the beggar or anyone else whose request is not morally improper. It is true the State's use of force differs from the gunman's in that there are good reasons for the former, but not for the latter. But the necessity of the State is also a positive aspect of why it deserves respect, not just a means of explaining why it does no wrong when it couples its demands with force. Thus the argument for the obligation to obey would be the same even in a State which, for some reason, was able to operate without adding sanctions to its laws.

one some moral reason to comply. When President Kennedy asked the steel companies to voluntarily roll back price increases, it is not implausible to think that some justification might have been required had they failed to do so. If that is so it may be because, though the office of the President is not rationally necessary in the same way as the State, that office stands out in our society in a way that makes good faith requests for action in the interests of the community worth a moral response.²⁴

B. *The Theory Is Too Weak*

1. *Respect Does Not Require Compliance*

Consider again the last example of a nonlegal but official request for action. If one is reluctant to conclude that such a request provides one with a moral reason to comply, it may be for another reason, not having to do with the focusing idea. The focusing idea only shows that officials may sometimes have a moral right to a response that is different from that enjoyed by any stranger. But by giving careful attention to the official request, I already show the official more respect than in the case of other unsolicited requests which, I assume, may be tossed unopened into the wastebasket. Why isn't this enough? How does one establish the stronger claim that one has a moral reason *to comply* rather than simply to consider the request?

This objection, applied to the obligation to obey, raises the general problem of how to derive the necessary content of the duty (an obligation *to obey*) from a theory that seems to generate only a duty to respect others doing necessary jobs. It is a problem that the standard utilitarian theory mentioned above was unable to surmount: from a general obligation not to engage in acts that threaten a valuable institution, the only specific duty one derives is a duty to obey, not all laws at all times, but only those laws in those circumstances where disobedience is likely to have the posited adverse effects. That some laws can be disobeyed without such effects or, for that matter, with positive effects on the legal system seems obvious to most people.²⁵ Why not also say, then, that a duty to respect those doing necessary jobs is ful-

24. But see Raz, *The Morality of Obedience* (Book Review), 83 MICH. L. REV. 732, 749 (1985) (reviewing P. SOPER, *supra* note 2) (suggesting that it is absurd to think that one has any duty to follow recommended governmental policies).

25. The matter is not entirely free from doubt, however, as will become clear if one actually tries to formulate a test for those laws that may be broken. If one simply proposes, as in the text, to authorize disobedience in those cases where adverse effects are not likely to result, one gives no specific guidance at all but only repeats the general utilitarian formula. Any attempt to give more specific guidance (disobey when you think the law is clearly wrong, or when you think your example will not affect others who may want to disobey other laws they think are wrong) is likely to result in rules one would be unwilling to have all people apply. It is this difficulty of describing

filled, as in the case of the official's request, simply by considering what is asked of me. Failure to give such consideration may require moral justification; but failure actually to act as requested will not.

There is one distinction between law and the official's request (or the request of anyone, for that matter) which indirectly helps answer this objection. Requests by definition appeal to the discretion of the person to whom the request is addressed. By labeling one's appeal a "request" instead of a command, one indicates that the matter is being left to the judgment of the person addressed, so that failure to act on the request is not necessarily an affront or disrespectful, though failure to consider the request might be. But laws, like commands, purport to allow no discretion in deciding whether to comply: if a person is legitimately issuing a command, one can show respect only by complying, not simply by listening and thinking about it.²⁶

But the case for viewing law as providing a moral reason to comply rests on more than this linguistic distinction between requests and commands. My claim that one always has some moral reason to comply with the wishes of those who in good faith have enacted laws designed to further justice as they see it is meant as a more accurate account of a moral dilemma we frequently face. The dilemma for the citizen is this: On the one hand, he confronts a law that he thinks is misguided, requiring action of him that he believes to be immoral. On the other hand, he believes that those who have enacted and stand behind the law have in good faith considered the morality of the law and believe that the action required is morally defensible and for the common good. We may even assume that the citizen is correct in his evaluation of the law and that the morally correct action for him in this case (in the ultimate sense) is to disobey. We are now considering two ways in which to describe the practical reasoning that leads to this conclusion. One is to say that, since the citizen's moral evaluation is the correct one, all the moral reasons for action are on his side; the only moral constraint based on the opposing judgment of those who disagree is that he listen and consider their views. He shows them

in advance those laws that can be "safely" ignored that makes a rule-utilitarian approach more likely to succeed in establishing a general obligation to obey than an act-utilitarian approach.

26. See H.L.A. HART, *ESSAYS ON BENTHAM* 253-55 (1982) (discussing the "peremptory" and "deliberation-excluding" nature of commands). Some requests, like "Pass the salt," are expected to be complied with in ways that make failure to do so rude, but that is due to the peculiar nature of the context. Indeed, asking for the salt to be passed hardly seems like a request at all, but simply a ritual prescribed by etiquette for issuing directions in a social setting in which all have tacitly agreed in advance to follow certain rules and formalities in coordinating a dinner. To command someone to "pass the salt" would be equally rude since it implies that one has superior authority, which in context is inappropriate, and because it indicates no faith in the other's ability or willingness to follow the normal rules of etiquette.

“respect” by doing the right thing — teaching them, as it were, to get it right next time. The other possibility is that we recognize that there is some reason to act as others want us to in recognition of their good faith effort to get things right. That reason has to be balanced against the seriousness of the error being made. The first description suggests that a proper moral theory would leave our citizen with no feeling of having resolved conflicting moral tugs. The second description suggests that even where the final action is the same — the citizen does the right thing — he must acknowledge that it is in opposition to a competing moral claim on him.

The latter way of describing this common dilemma seems to me a more accurate picture of our moral life. Imagine the parent confronted with a child’s demand that the parent thinks is unjustified and bad for the child or the family. At the same time, the parent recognizes that the child has struggled hard with the normative question of whether the demand is proper and in the family’s interest. To say that the parent’s only moral reason for action is determined by the ultimate “objective” assessment of whether the action demanded would be a good thing ignores the effect such a decision has on the willingness of the child to try to make an accurate assessment next time. The tug is between doing the right thing, on the one hand, and rewarding good faith effort on the other. Teachers sometimes reward students for effort even though, objectively assessed, the product is inferior. Employers sometimes do the same for employees. Spouses, colleagues, friends who disagree on the merits of proposed action often recognize that in addition to doing the right thing, something else counts: doing what one’s spouse, colleague, friend wants — even though it’s the wrong thing — as long as there has been a good faith attempt to assess the competing claims of merit.

Why is law and my relationship to those officials and citizens who disagree about the merits of legally demanded action different? To be sure, the relationship is not the paternalistic or intimate one suggested by some of the above examples. But the structure of the argument is similar. Value disagreement cannot be avoided. By hypothesis we have gone as far as we can in resolving the dispute about the morality of the action required. On the one hand, to suggest that I have any moral reason, however slight, to go along with ill-conceived laws “only encourages them.” But on the other hand, to say I have no such reason ignores the good faith effort to get it right and “encourages them next time” to ignore the need to justify power and instead simply to wield it. This explanation sounds utilitarian: there will always be some reason to go along in the potential effect that obedience will have

on the incentive to continue to try in good faith to justify laws. This effect is to be weighed against the bad consequences caused by the particular action the law requires. But one could just as easily make the point in nonutilitarian terms. I have a reason to comply, even if the action is wrong, because I would expect the same if the situation were reversed and I were the one in charge. Even though my assessment of the law is, by hypothesis, correct, the opposite view has been reached in good faith by persons equally rational and equally attempting to achieve a just solution.²⁷

2. *There Is No Obligation in States That Do More Than Is Necessary*

Even if persons doing necessary jobs deserve moral respect, one might think that remains true only so long as the directions they issue are within the prescribed limits of their "job." A traffic policeman may require me to stop my car but not to wash it. So, too, one might think that the only "legitimate" job of the State is a very narrow one, e.g., that of a mere "nightwatchman." Any law, then, that addresses a matter outside of the State's permissible area of interest has no moral claim on me.

The problem with this objection is that it confuses a moral claim about how a State should act with a conceptual claim about what a State is. Most people will agree about the necessity of establishing a relative monopoly on force. Many people disagree about how that force should be exercised. The latter disagreements raise the substantive questions of political theory that determine when State power is being used immorally. Some think that any forced redistribution of property is immoral. Others think permitting continued inequality in private holdings is immoral. There are many variations between these extremes — and this is only one of the many themes over which disputes can arise about how State power should be exercised. But all of these disputes seem logically on a different level from arguments about whether some monopoly on force should exist in the first place. All of these arguments seem to be about *how* the job should be done, not about what the job is.²⁸

27. To put the point in more explicitly Kantian terms, if it is good will that deserves respect, then the kind of action that shows such respect is that which conforms with what is willed — doing what is, wanted, not just listening.

28. Classical political theorists seem to agree in distinguishing the concept of the State, defined in terms of its relative monopoly on force, from the question of how the State should exercise that force. One possible exception is Locke who suggests that an absolute monarchy in which there is no possibility of appeal from the arbitrary will of the ruler is "*inconsistent with Civil Society*, and so can be no Form of Civil Government at all." J. LOCKE, *TWO TREATISES OF GOVERNMENT* 369 (second treatise, § 90) (P. Laslett ed. 1960) (emphasis in original). This view

If we really are going to accept that doing some jobs deserves respect despite good faith errors, we need some way to distinguish errors from “ultra vires” actions. That is easy enough in the case of the traffic policeman because we assume the validity of those rules that define and limit his power. Indeed, those same rules usually make the determination of jurisdiction (“job description”) relatively easy, however much we may disagree about whether a particular order was a wise one. In the case of the State, however, there is no further source to which we can appeal — except for moral theory itself. Thus, every claim that the action in question is ultra vires will be structurally indistinguishable from the claim that an error (within the job description) has been made. Moreover these claims, as has been noted, are typically controversial compared to claims about the need to establish a monopoly on force, so that, again by analogy to the policeman, it is the latter — the exercise of a monopoly on force — that appears to be the job description. There seems little alternative, in short, but to begin with a *de facto* concept of the State as the description of “the job”; all subsequent arguments, about the *de jure* State, will be arguments about what constitutes errors made within that job description.

3. *There Is No Obligation if Disobedience Can Be Kept Secret*

In describing the moral value of law, I emphasized that it is other people — those who support the law in question — who deserve my respect. I did so primarily to contrast the theory with the standard utilitarian theory that looks to the effect of disobedience on the system itself. The legal system will survive many acts of disobedience and may be improved by some. But whatever one concludes from this “objective” assessment of the consequences of proposed disobedience, there will always be a “subjective” factor to weigh — the interests of those who, right or wrong, believe that I should conform to the law in question.

Putting the matter this way leads to the same objection that utilitarian theories always encounter when they depend on the impact of action on others. If no one will find out about my disobedience (or my deathbed promise, or my breach of trust, etc.), then there is no

of Locke is combined with his consent theory of obligation which seems strong enough, in Locke's view, to entail an obligation to obey even unjust laws — with the possible exception of justified rebellion when most or all of the people rightly disagree with the Prince's defense of his rule. *See id.* at 393-94, 476 (§§ 121, 122 & 240). The combination of these views supports the thesis developed here: there is a connection between the concept of a legal system (or civil state) and the obligation to obey; where the latter does not exist, because, for example, an arbitrary ruler sets himself above the need to justify his rule, we are no longer dealing with a civil state, but with a coercive system.

moral reason to comply and the theory falls short of its goal of showing that laws always have some moral value.

This objection may be less appropriate in this context than in some others (e.g., the deathbed promise) for several reasons. First, it seems harder to rule out the possibility that those who desire my compliance may find out — if nothing else I may confess.²⁹ Second, if the parallel we are using is the Austinian claim that there is always a prudential reason to obey, we may establish a moral reason of similar frequency. Austin stressed that there is law wherever there is some chance, however slight, of incurring a particular kind of sanction, so that even those who think themselves most unlikely to be “found out” or caught still confront “law.” So too, as long as there is some chance, however slight, of “moral discovery,” there is a moral reason to comply. Finally, it would be a mistake to become preoccupied with the utilitarian calculus in assessing a theory designed to explain our moral intuitions about the law. The interesting cases of the obligation to obey are not cases in which there is much chance of or interest in keeping one’s action secret. If a moral theory explains all but the secret act, it provides a fairly substantial counterweight to current views that seem to deny an obligation to obey in far wider circumstances. And there may well be nonutilitarian explanations for why the secret act too is subject to the moral constraint: explanations that require assessing action from the viewpoint of others whether or not they will ever actually find out.

Does this mean that every law I ignore or break, however trivial, inculcates me in a moral wrong? Do I commit a moral breach because I commit a “technical” trespass across my neighbor’s lawn?

One must be careful in using examples of apparently “trivial” laws to test intuitions about the obligation to obey. In part, this is because the weight of the moral obligation will vary, depending on the law, just as the weight of the obligation to keep a promise will vary depending on the nature of the promise. Some laws, of the “fussy regulation”³⁰ type, may not reflect a very strong interest so that relatively less is required in terms of justification when they are ignored. As for private

29. The standard utilitarian theory that disobedience is wrong when it might have an adverse effect on the legal system does not establish an obligation to obey all law just because there is always some nonzero empirical possibility of an adverse effect. Something more than nonzero possibility is required in order to constitute a utilitarian reason for acting. But when one moves from the “objective” effects of action (on the system) to the effects on the “subjective” interests of others, the possibility described in the text seems real enough to prevent being ruled out as empirically implausible.

30. “[There are] many fussy regulations whose breach it would be pedantic to call immoral” Smith, *supra* note 14, at 974 (quoting P. DEVLIN, *THE ENFORCEMENT OF MORALS* 27 (1965)).

law, such as the trespass example, these usually designate the private individual concerned as the only one with "standing" to complain, so that if my neighbor doesn't care, then I do no wrong — legally or morally. But if my neighbor does care, if I am sued even for the "technical" trespass, then the conclusion required by the theory is clear. If the law permits recovery, even if only of "nominal" damages, I had a moral reason as well as a legal reason to comply with my neighbor's wishes — a moral reason in addition to any that I may have had in the absence of the trespass law.

IV. OBSTACLES

The preceding analysis responds to specific objections to a particular moral theory. Analysis alone, however, seldom persuades when the issue involves matters as basic and as subject to disagreement as the problem of political obligation. This weakness of reason in moral argument is partly due to the fact that we do not have an agreed-upon moral theory by which to test competing claims about political obligation. Thus, the competing claims and our evaluation of them become themselves part of the process by which we discover (some would say invent) the features of our moral life.

This process of discovery can sometimes be assisted by supplementing analysis with the perspective of the behavioral scientist who is curious about what causes fashions in philosophy to come and go. Thus Hobbes's political theory, which counsels unconditional surrender to the State, has often been "explained" as a response to the conditions of civil strife in which he wrote.³¹ In this last section, I temporarily adopt a similar perspective in describing four possible obstacles to the view defended above about the moral value of law. These explanations do not deal with the merits of the issue, but point instead to extraneous factors that may account for the current temperament.

A. *The Scientific Analogy*

Ours is an age in which the scientific model dominates our ideas about appropriate models in other areas as well. The clearest example is perhaps that of the Vienna Circle, which led to moral theories in the first part of this century that declared most ethical claims to be mean-

31. "The *Leviathan* . . . was written in a time of revolution and unsettlement as a persuasive to cessation from fruitless civil strife. For its immediate purpose, as an exhortation to peace, it was right and proper that the author should develop the contention that peace is the real interest of his fellow-countrymen as persuasively as he could . . ." Taylor, *supra* note 7, at 407, reprinted in HOBBS'S *LEVIATHAN*, *supra* note 7, at 36.

ingless because they could not be verified in the same way that we verify empirical claims. Though this particular verifiability thesis may have seen its heyday, the tendency to react to moral claims the same way one would to a scientific claim could explain why some might find the theory described here implausible.

Imagine trying to defend the following proposition: There is a *prima facie* obligation to go along with the claims of those in charge of a scientific investigation, as long as those claims are made in the good faith belief that they are true. As it stands, this proposition has little to recommend it — even as a rule of thumb about whether to assume the truth of the scientific claims put forward pending further evidence. That is because there is a critical qualification missing that the scientific model would require us to add in order to give authority to truth claims: there must be some reason to think that those in charge have expertise or special “scientific” abilities to justify the respect they claim. Good faith alone will not give even presumptive validity to the empirical statements of the unqualified.

Should we say the same of those who claim, in good faith, that their laws are just? Should we demand a minimum test of “moral competency” as well as good faith as a prerequisite for moral respect? Is the image of the moral idiot, with empty head but good heart, one that should lead us to qualify the claim that there is always a moral reason to comply with the law?³²

If we think that the scientific model is the appropriate one, the answer will perhaps be in the affirmative. But the idea that the scientific model *is* the appropriate one ignores the major difference between value statements and factual ones. Value disagreement appears endemic precisely because we have no test (such as verifiability) that will facilitate or force consensus as in the case of science. Thus, there is no way to distinguish errors caused by “incompetence” from errors caused by misjudgment or false moral theories. The theory defended here is not a claim that those in charge are presumptively more likely to be right in their assessment of the morality of the laws they enact. It is a claim about the duty to obey even though those in charge have no more wisdom or claim to moral expertise than anyone else.

I assume that those in charge of legal systems are ordinary humans, of ordinary capacity. I also assume that “good faith” entails openness to the kind of discussion and dialogue that seems the only

32. This argument was first brought to my attention by one of the members of the Legal Theory Workshop at Columbia Law School in February 1984. The argument also appears in Burton, *Law, Obligation, and a Good Faith Claim of Justice* (Book Review), 73 CALIF. L. REV. 1956 (1985) (reviewing P. SOPER, *supra* note 2).

process we have for reaching normative consensus.³³ Given those assumptions, I do not see how any further tests in terms of "qualifications" to make moral judgments is possible — or, for that matter, desirable: there may be more to fear from the idea that there are moral "experts" than from the assumption that all are equally expert, assuming good faith.

B. *The Fear of Absolutes*

If Hobbes overreacted to the horrors of civil strife that he saw, it may be that today's skepticism about the moral value of law represents a similar overreaction to a century filled with examples of government injustice and misconduct. One need not go back to the overused example of Nazi Germany to make the point; many will find examples closer to home in the cases of both the Vietnam War and Watergate.

That laws are often unjust and that civil disobedience is often morally appropriate may be conceded. The question, once again, is whether *some* moral weight attaches to the law in light of the good faith effort to perform a necessary job. I shall not repeat here the arguments for thinking it does. I raise here only the question whether, having become acutely aware of how often legal authority can be abused, we have perhaps overreacted in the opposite way from Hobbes. In order to make the point that law does not possess the absolute authority it claims, we insist that, *qua* law, it has no moral authority at all.

Part of the problem here is the fault of legal theory itself. Law does appear to claim absolute, not just partial, authority. By that I mean that those who pass and enforce laws implicitly or explicitly endorse two distinct claims: (1) that what the laws require is morally defensible, and (2) that this judgment about the justice of the laws, even though it may be wrong, must prevail over contrary judgments. It is the latter claim that amounts to a claim of absolute authority — it is not a claim of infallibility in determining what justice requires, but a claim that citizens who disagree must submit to the State regardless of whose judgment is correct. But no contemporary political theorist, as we have seen, accepts that such an absolute claim to authority is justified: there is always a possibility of justified civil disobedience. How, then, can those in charge purport to claim a kind of authority which,

33. See P. SOPER, *supra* note 2, at 134. Hume made a similar point:

We shall only observe . . . that though an appeal to general opinion may justly, in the speculative sciences of metaphysics, natural philosophy, or astronomy, be deemed unfair and inconclusive, yet in all questions with regard to morals, as well as criticism, there is really no other standard, by which any controversy can ever be decided.

Hume, *Of the Original Contract*, reprinted in HOBBS'S *LEVIATHAN*, *supra* note 7, at 26, 34.

as soon as they think about the matter from a moral point of view, they must concede is indefensible?

This seeming paradox has three possible solutions. One is to try to show that both claims are compatible: the state may justly enforce its decisions without exception, even though the citizen may be morally justified in disobeying.³⁴ A second solution is to view the law's claim as a kind of hypocrisy or moral blindness which requires the kind of debunking overreaction we have been considering here: one counters the State's claim with an exactly opposite claim that is equally absolute (and just as erroneous): law, *qua* law, never has moral authority. A third possibility, as yet largely unexplored in the literature, is to see whether legal theory is itself in error in insisting that legal authority must claim to be absolute. Is it possible that the commands of the law can be seen in a way that allows for justified disobedience?³⁵

C. *The Fear of Relativism*

If ours is not an age that has much respect for moral absolutes, is it then an age that fully embraces the opposite extreme: all moral judgments are subjective or relative and do not admit of any objective or rational means of evaluation? Many people think some such view does characterize the modern era. But many also still engage in moral argument as if the goal were more analogous to truth than a kind of mind control. In particular, I assume that those who engage seriously in the question of the obligation to obey do so on the assumption that the enterprise has some kind of objective yardstick by which to evaluate competing claims; we are not simply attempting to brainwash each other through superior techniques of persuasion.

This assumption — that relativism is incorrect — provides another possible explanation for a negative reaction to the theory defended here. The theory appears to make critical, not what is correct, but what others think is correct. People deserve moral respect because of their subjective views about what is right or necessary; but an objective moral theory seems to counsel taking account, not of what people think is in society's interest, but what really *is* in society's interest.

34. See *The Symposium in Honor of A.D. Woosley: Law and Obedience*, 67 VA. L. REV. 3 (1981).

35. The problem, of course, is that if the law itself incorporates a defense for "justified disobedience," then the act is not one of disobedience after all. Compare M. KADISH & S. KADISH, *DISCRETION TO DISOBEY* (1973), with Smith, *Concerning Lawful Illegality* (Book Review), 83 YALE L.J. 1534 (1974) (reviewing M. KADISH & S. KADISH, *supra*). What is needed is some way to accommodate the law's demand to have the final say now (at the time of trial and sentence) with the fact that the future may prove the State wrong, and the civil disobedient right, about the justice of the law. We need a theory of mistakes about the law that will yield sanctions against the State when it is proved wrong and that, thus, weakens the claim to absolute authority.

I have already addressed the basic issue that underlies this view in indicating why subjective interests, even if wrong, deserve respect.³⁶ What is worth emphasizing here is that the theory is not relativistic in the extreme sense, even though it does make critical the subjective rather than the "true" views of others. First, the subjective views count only because an objective evaluation proves that the enterprise is a necessary one. Any enterprise unable to meet this objective test will not give moral status to the subjective interests of those in charge. Second, the reasons why the subjective views count, even within a necessary enterprise, are themselves objective ones. Subjective views count, not because there is nothing more to morality, but precisely because morality in this case, for reasons explored above, makes the inevitability of good faith disagreement over value as important as who is right. If anything, those who seek a moderate position between the extremes of absolutism and relativism should be sympathetic to a theory that combines both objective and subjective elements in this fashion.

D. *Facts and Values*

A final obstacle to the view that law always has moral value stems from the insistence on the distinction between facts and values. I myself relied on this distinction above to suggest that the scientific model is not always the correct model to apply in the case of value judgments. But, though it is a mark of our age to continue to think at some level that facts and values are different, the interesting question is how radical that difference is and in what sense connections can be established.

What is implausible for some about the claim that law always has moral value is the combination of two propositions. The first proposition is that "law" is a factual term. One determines what a legal system is by reference to certain social facts (the monopolization of force and the belief that the force is being used justly). The second proposition is the one defended here: this particular set of social facts always has moral value. The problem comes in explaining what one means by "always." How strong is the connection here between fact and value, and how can it be explained without violating modern ideas about the distinction between these two realms?

I have discussed this question elsewhere,³⁷ and will simply summarize here what seem to me the main possibilities. One possibility is

36. See text at notes 18-27 *supra*.

37. See Soper, *supra* note 1.

that we have decided to limit the term "legal system" to just those factual phenomena that do seem to us to have the associated moral value. This approach makes the connection between law and its moral value analytic and uninteresting. The other possibility is that we discover as we investigate the social facts that seem to correspond with our use of the term "legal system" a constant connection with moral value, as evidenced, for example, by a theory such as that defended here. We now ask whether this constant conjunction is merely a contingent feature — like crows being black — or whether the connection is somehow essentially connected with the idea of law, not in the analytic sense but in some other sense. But what is there between the analytic and the synthetic?

That last question I am not going to attempt to address here. I raise it only because I believe it is worth remembering that there is a tradition in philosophy, usually traced to Kant, that takes seriously the need to explain the connection between two phenomena (e.g., cause and effect) in a way that is true to our sense that the connection is more than contingent and yet less than analytic. The important point here is that even if facts and values are separate, that conclusion is only the starting point for the interesting inquiry into the ways that these realms connect. Legal systems are not just any old fact; they are among the most ubiquitous and basic institutions for organizing human interactions. To suggest that there is always moral value to the law is not like suggesting that some other phenomenon — say, apples — are always "good" (in a nonmoral, but evaluative, sense). Apples are generally good, but sometimes they are rotten, and the reasons that lead to the factual description of an object as an "apple" are not connected in any obvious way with the reasons that lead us to ascribe value to them. But a basic institution like law may be one of the ways that we learn about morality in the first place. That there might be a universal connection between law and morality will seem less surprising if what gives rise to the sense of duty and morality is itself confrontation with certain basic ways of organizing human interaction.

A nonlegal example may help illustrate the last suggestion. The question whether one has a *prima facie* obligation to keep a promise is probably, for many, an easier question to answer in the affirmative than the question about the obligation to obey the law. I have suggested elsewhere that, in fact, there is a very precise parallel between the institution of promise-keeping and that of law as respects arguments about the connection with a moral conclusion.³⁸ Thus, there

38. *See id.*

are some who think that the connection between "promise" and "moral obligation" is analytic, which makes promise itself a moral concept. Others accept that one can determine that a promise was made by reference solely to facts, but, as in the case of law, reasons can be given to show why these facts always yield certain moral conclusions. Finally, some deny that there *is* always an obligation to keep a promise (even in the weak sense in which we are considering the obligation to obey the law): from the bare fact that a promise was made, one can infer nothing about what, morally speaking, one ought to do.

Notice that this last claim about promises parallels the answer some contemporary writers give to the question we asked about law at the beginning of this paper. I suspect that most people will intuitively respond to the case of promise by insisting that, even if it does not bind absolutely, there must be some justification forthcoming for the failure to keep the promise. If that is so, and if it is so not as a matter of definition (analytic), it is likely to be because promising is one of those basic kinds of institutions out of which we develop our sense of morality. If I am right that the parallel between law and promise is quite precise, one might discover that an adequate theory about why promises always provide some moral reason to keep them will resemble the theory developed here. The "subjective" interests of the promisee (whether or not these reflect his "true" interests or the ultimately "correct" thing to do) partly determine my obligation because the promising institution is a necessary one and the promisee, in good faith, has considered and rejected my claims about why keeping this promise would be unfair or harsh.

The only question then left is why views about promise-keeping seem to undergo less change over time than views about the obligation to obey. As suggested by some of the reasons discussed above, the difference may be this: submitting oneself to a promise is still a voluntary decision; submitting oneself to law is not. Hostility to the notion of promise — to the abuse that a promisor can commit in "morally" demanding his rights — is tempered by the fact that I can avoid future promises with this person and by the fact that moral pressure alone is weak. But I have no escape from the State and the State's abuse of its moral position also leaves me subject to physical abuse. These differences may explain why, even though the moral value of both institutions may rest on a similar theory, in practice current causes of discontent with one institution or the other will have dissimilar impacts on one's ability fairly to assess the claim to moral value.